IN THE

Supreme Court of the United States

OCT 27 1950
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1950

No. 388

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

WILLIAM PATRICK BRANDHOVE,

Cross-Petitioner,

vs.

ELMER E. ROBINSON,

Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Cross-petitioner prays that a writ of certiorari issue to review that portion of the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on June 30, 1950, wherein the judgment of the District Court dismissing cross-petitioner's complaint against cross-respondent was affirmed.

OPINIONS BELOW.

The memorandum opinion of the District Court (R. 124-126) is unreported. The opinion of the Court of Appeals (R. 137) is reported in 183 F. (2d) 121. A rehearing in the Court of Appeals was denied to cross-petitioner on August 9, 1950. (R. 148.)

JURISDICTION.

The judgment of the Court of Appeals was entered on June 30, 1950. (R. 147.) A rehearing in the Court of Appeals was denied to cross-petitioner on August 9, 1950. (R. 148.) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED.

1. Whether cross-petitioner's complaint filed in the District Court sufficiently states a claim for relief against cross-respondent under the Civil Rights Statutes.

2. Whether the District Court's error in dismissing cross-petitioner's complaint against all defendants effectively deprives cross-petitioner of his right to amend such complaint as to his claim for relief against cross-respondent.

STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix A, *infra* pp. i-iii.

STATEMENT.

Cross-petitioner filed a complaint in the District Court against Jack B. Tenney, The Senate Fact-Finding Committee on Un-American Activities (a California Legislative Committee), Hugh M. Burns, Louis G. Sutton, Clyde A. Watson and cross-respondent Elmer E. Robinson for general, special and punitive damages in the sum of $250,000.00. (R. 3.) The complaint was under the Civil Rights Statutes (Rev. Stat. Sections 1979, 1980; 8 U.S.C. Sections 43, 47 (3); Appendix A *infra* pp. i-ii) and alleged acts done or participated in by all the defendants

> "with malice and intent to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the [California] legislature for redress of grievances, and also to deprive him of the equal protection of the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, and so did intimidate, silence, deter and prevent and deprive plaintiff." (Complaint par. 13; R. 10.)

The complaint further alleged that all the acts done by the defendants, other than cross-respondent, were done under color of state law (Complaint par. 14; R. 10.) With regard to cross-respondent, the complaint alleges his liability as a conspirator with the other defendants, and in conjunction with paragraph 13 of the complaint above quoted, it was stated in said complaint as follows:

> "all defendants, including defendant Elmer E. Robinson, conspired for all of the aforesaid purposes and acted in furtherance of said conspiracy in the manner herein above set forth." (Complaint par. 14; R. 10.)

The substance of cross-petitioner's allegations in the complaint is: that cross-petitioner circulated a petition among the members of the California Legislature for the purpose of persuading the legislators to discontinue further appropriations of funds for the [California] Senate Fact-Finding Committee on Un-American Activities; that the subject matter of said petition was stated therein, as follows:

> "I, William Patrick Brandhove, charge that the California Senate Committee on Un-American Activities (The Tenney Committee) used me as an instrument to smear Congressman Franck R. Havenner as a 'Red' when he was a candidate for Mayor of San Francisco in 1947, and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck Havenner's opponent, conspired with the Tenney Committee to this end" (R. 18-19);

That while cross-petitioner was engaged in circulating his petition, defendant Tenney, the chairman of said Committee, communicated by telephone with cross-respondent and discussed with him "ways and means of best thwarting the charges contained in said petition and defeating the purposes stated in said petition and agreed that a hearing should be held on the following day by the Tenney Committee whereat defendant Elmer E. Robinson should appear as a voluntary witness and deny the truth of the charges with reference to him and his connection with the Tenney Committee contained in said circulated petition" (R. 5); that the hearing, as agreed, was held the next day and "was held, as was known to all defendants for the purpose and object of suppressing the criticism of plaintiff in his circulated petition and the charges therein directed against the Tenney Commttee and the individual defendants to the end that said Committee should obtain the appropriation of funds requested from the California Legislature" (R. 6); that cross-respondent participated in the hearing, first, by making a lengthy unsworn

statement, and then, after having been sworn as a voluntary witness, was by the chairman of the Committee led to and did engage in a course of justification as to the charges raised against him and the Committee in plaintiff's circulated petition (R. 7); that the hearing held was unfair, partial and unlawful, and in conformity with its purpose culminated in disparagement of plaintiff by reading into the record thereat, by the chairman of the Committee, an alleged and false criminal record of plaintiff and other slanderous statements (R. 7); that cross-petitioner was charged with criminal contempt by the Committee for failure to answer questions at such hearing, having taken the position that the hearing was improper and not for any legislative purpose but for the purpose of silencing, deterring, and intimidating him in his political campaign against the committee (R. 8); that cross-petitioner was arrested and imprisoned in advance of trial on such contempt charge, tried, and upon jury disagreement (11-1 for acquittal) the charges were dropped by the prosecution. (R. 9.)

The District Court dismissed the complaint before trial and entered judgment that the action be dismissed on the merits as to each and all the defendants. (R. 125.) Thereafter, on appeal of cross-petitioner, the United States Court of Appeals for the Ninth Circuit affirmed the judgment in favor of cross-respondent and reversed the judgment with remand for further proceedings, as to all other defendants. (R. 147.)

In holding the complaint against defendant Robinson insufficient as distinguished from the result reached as to all other defendants, the Court below referred to the allegations relating to the telephone conversation preceding the Committee hearing in question between defendant Tenney and defendant Robinson and stated, as follows:

> "It is more than doubtful whether these allegations are sufficient to implicate Robinson in a conspiracy with the Committee to abridge any of appellant's federally protected rights. We are unable to say that the Court was in error in dismissing the complaint as to him". (R. 145-146; 183 F. 2d 121, 124-125.)

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that the cross-petitioner's complaint is insufficient to implicate cross-respondent in a conspiracy to violate federal rights of complainant protected under the Civil Rights Statutes.

2. In failing to hold, assuming cross-petitioner's complaint was insufficient with regard to cross-respondent, that cross-petitioner was entitled to amend his complaint.

3. In affirming the judgment of the District Court with regard to cross-respondent.

REASONS FOR GRANTING THE WRIT.

I.

A. A conspiracy is an agreement or understanding between two or more parties to do an unlawful thing or to do a lawful thing in an unlawful manner. See *Pinkerton v. United States,* 151 F. (2d) 499, 501, 328 U.S. 640, 647.

B. An unlawful agreement need not be shown to exist in any formal way, it being rare that an unlawful agreement can be so shown, and the mutual understanding between the parties, or any two or more of them is all that is necessary to prove conspiracy.

See:

Direct Sales Co. v. United States, 131 F. (2d) 835;

Blumenthal v. United States, 158 F. (2d) 883, 332 U.S. 539, 557;

United States v. Paramount Pictures, 334 U.S. 131, 142.

C. It is not essential that each conspirator have knowledge of the details of the conspiracy, or of the exact part to be performed by the other conspirators in execution thereof; nor is it necessary that the details be completely worked out in advance to bring a given act within the scope of the general plan.

See:

Picking v. Pennsylvania Ry. Co., 5 F.R.D. 76, 77.

See also:

United States v. Randall, 164 F. (2d) 284, 288-289 (C.A. 7).

D. The law gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it without requiring evidence of knowledge of all its details, or of the participation of others. Otherwise the difficulties not only of discovery but of certainty and proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity.

See:

Blumenthal v. United States, 332 U.S. 539, 557;

United States v. Randall, 164 F. (2d) 284, 288 (C.A. 7).

Connerly v. Gishwiller, 162 F. (2d) 428, 433 (C.A. 7):

"A conspiracy is very nearly always from the nature of things, provable only by circumstantial evidence, by inferences reasonably deducted from facts proven. It may be inferred from the nature of the acts complained of, the individual and collective interest of the alleged conspirators, the situation, the intimacy and relation of the parties at the time of the commission of the acts, and generally, all of the circumstances preceding and attending the culmination of the claimed conspiracy."

E. The subjective elements of a conspiracy may be pleaded in general terms.

See 28 U.S.C. following Section 723c, Rule 9b Fed. Rules of Civil Procedure:

> "Malice, intent, knowledge and other condition of mind of a person may be averred generally."

II.

The decision of the Court below in the instant case disregards the foregoing settled rules of the law of conspiracy and hence arrives at an erroneous result.

(a) The Court below considered in isolation one pleaded incident, namely, the telephone conversation between Tenney and Robinson—an important link in the alleged conspiracy, but by no means the only fact pleaded to connect Robinson with the conduct of the other defendants. In so limiting its scrutiny to a single incident, the lower Court deviated from the fundamental rule that a complaint must be read as a whole with a view to give proper effect to the intent therein expressed.

In the instant case, the allegations of the complaint include the statement that complainant's circulated petition attacked *both* the Tenney Committee and the defendant Robinson because of their improper cooperation specified in complainant's pleaded petition at the election wherein Robinson was chosen Mayor of San Francisco. Thus, there is clearly pleaded a congruity of interest between Robinson

and the other defendants to intimidate and silence cross-petitioner.

Against this pleaded background, Robinson's connection as a conspirator clearly appears from complainant's allegations that defendant Tenney, immediately upon learning the fact that cross-petitioner was circulating his petition, contacted defendant Robinson and discussed with him by telephone the ways and means of best thwarting the charges affecting Robinson as well as the members of the Committee contained therein, and then and there agreed with Robinson to intimidate and silence cross-petitioner at a staged hearing for such purpose at which Robinson was to be the star witness; that such a hearing was immediately held as agreed; and that Robinson's appearance and conduct at such hearing constituted full performance of his agreement with Tenney. (R. 7-8, 45-46, 47, 50-67.)

With this pleaded congruity of interest, participation in planning the alleged abuses of State power and the active participation in the execution of such design, Robinson was clearly implicated in the alleged conspiracy. With such facts pleaded, cross-petitioner sufficiently links Robinson with the plan and the actions of the other defendants to buttress the allegations of ultimate fact that all of the defendants, including Robinson, in all purposes and actions set forth in the complaint. (Complaint pars. 13, 14; R. 10.)

III.

The fact that cross-respondent was not exercising state authority or himself acting under color of state law is immaterial since it is recognized that a defendant may be convicted of a conspiracy to commit an offense when in the nature of things he could not have committed the offense himself, if it be an offense which one of his co-conspirators could commit. This rule applies to actions in damages sounding in tort as well as to criminal actions.

See:

Johnson v. United States, 158 F. 69, 72 (C.A. 5);

United States v. Trierweiler, 52 F. Supp. 4 (D. C. Ill.);

Downs v. United States, 3 F. (2d) 855, 857;

Picking v. Pennsylvania Ry. Co., 151 F. (2d) 240;

Reitmeister v. Reitmeister, 162 F. (2d) 691;

Connerly v. Gishwiller, 162 F. (2d) 428 (C.A. 7);

11 *Am. Jur.,* 547, footnote 7;

5 A.L.R. 787;

74 A.L.R. 1114.

IV.

(a) All pleadings shall be so construed as to do substantial justice. This mandate is codified in Rule 8f of the Federal Rules of Civil Procedure and is the heart of the rules on pleadings.

See:

28 U.S.C. following section 723c (Rule 8f);
2 *Moore's Federal Practice,* 2nd Ed., p. 1711.

Maty v. Grasselli Chemical Co., 303 U.S. 198, 200:

"Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end * * * Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment."

(b) Under Rule 8a(2) of the Federal Rules of Civil Procedure a short and plain statement of the claim showing that the pleader is entitled to relief is sufficient. There is no requirement that the pleadings state facts or ultimate facts or facts sufficient to constitute a cause of action.

See:

Dioguardi v. Durning, 139 F. (2d) 774, 775 (C.A. 2);
28 U.S.C. following Section 723c (Rule 8a(2)).

(c) With regard to the pleadings the general rule is likewise stated in *Williams v. Miller,* 48 F. Supp. 277, as follows:

"It is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer".

(Words used by Mr. Justice Stone and Mr. Justice Cardozo concurring in ***Borden's Farm Products Co. v. Baldwin,*** 293 U.S. 194, 213.)

As also stated in ***Williams v. Miller,*** supra, at page 280 thereof, the United States Supreme Court, where unconstitutionality of State Legislation was the contention:

> "* * * held it to be error to dismiss a complaint for failure to state a cause of action when it alleged facts such that their proof might reasonably lead the Court to hold the legislation unconstitutional. Polk Co. v. Glover, 305 U.S. 5, 59 S. Ct. 15, 83 L. Ed. 6 supra; Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 55 S. Ct. 187, 79 L. Ed. 281. In both cases the Court expressly refrained from deciding that the plaintiff would be entitled to relief upon proof of the facts alleged; the determination of that question was postponed until evidence of the actual facts was before the Court, so that the Court, 'in enforcing individual rights, shall not proceed upon false assumptions' ".

It can hardly be contended in the instant case, that the complaint, accepting its allegations as true, fails to state facts "utterly unsuggestive of the invasion of any constitutional right". See ***Williams v. Miller*** (supra) at page 280.

V.

In the instant case the District Court dismissed cross-petitioner's complaint against each and all the defendants. (R. 124-126.) Such decision precluding

responsibility of all defendants, at that stage, rendered the question moot as to whether cross-respondent Robinson was sufficiently charged with participation in a conspiracy in the pleadings. Upon reversal of the judgment of the District Court by the Court of Appeals with regard to all the defendants excepting cross-respondent, it was recognized by the Court below that the torts of the remaining defendants were sufficiently pleaded. With such recognition, the question then became vital: whether cross-respondent is sufficiently implicated by the pleadings as a conspirator. Even assuming the complaint to be insufficient for such purpose, it is submitted that the affirmance by the Court of Appeals without leave to amend the complaint with regard to said cross-respondent was improper.

See:

Federal Rules of Civil Procedure, Rule 15a;
28 *U.S.C.,* following Section 723c.

VI.

The issues raised in this cross-petition for a writ of certiorari are important for the following reasons:

(a) Under the Civil Rights Statutes, as well as under general tort and criminal law, the concept of conspiracy, its extent and limitations, and the concomitant problem of pleading in such cases has become of ever growing importance; fundamental federal rights are rarely denied by individual action; powerful combinations engage in such deprivations of the

rights of others and are in a position to hide the details of their plans and actions from the scrutiny of the persons injured and from prosecuting authorities. If the decision of the lower Court in the instant case with regard to cross-respondent be allowed to stand as a beacon for other Courts to follow, the effective enforcement of the Civil Rights Statutes would be blocked by insurmountable barriers to the pleader.

(b) The requirements for pleading a conspiracy under the Civil Rights Statutes can be no different from those under regulatory statutes such as the anti-trust laws, Economic Control legislation and other regulatory statutes. In criminal as well as civil proceedings of most important nature defendants could therefore rely on this recent decision of the Court of Appeals to cast doubt on rules of law which seemed before established.

(c) Important rules of pleading in the Federal Courts could be denied application in reliance on this decision which ignores the progress made under the new rules made in departure from common law pleading.

(d) Clearly the questions presented in this case are of primary importance in the protection of fundamental federal rights and cross-petitioner should not be denied his day in Court against anyone who, under his allegations, conspired to defeat those rights in question.

CONCLUSION.

For the foregoing reasons, this cross-petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
October 23, 1950.

Respectfully submitted,
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(Appendix A Follows.)

Appendix A

STATUTES INVOLVED.

(1) Rev. Stat. § 1979 from Act of Apr. 20, 1871 c. 22 § 1, 17 Stat. 13; Title 8 U.S.C. section 43:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

(2) Rev. Stat. § 1980 from Acts July 31, 1861 c. 33, 12 Stat. 284; Apr. 20, 1871 c. 22 § 2, 17 Stat. 13; Title 8 U.S.C. 47(3):

> "Conspiracies; to deprive citizen of rights or privileges. If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is

lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a member of Congress of the United States; or to injure any citizen in person or in property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

(3) Federal Rules of Civil Procedure, 28 U.S.C. following section 723c:

Rule 8 (a) (2):

(a) "Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain * * * (2) a short and plain statement of the claim showing that the pleader is entitled to relief * * *."

Rule 8 (f):

(f) "Construction of Pleadings. All pleadings shall be so construed as to do substantial justice".

Rule 9 (b):

(b) "Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally."

Rule 15 (a):

(a) "Amendments. * * * Otherwise a party may amend his pleading only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires. * * *."